V Medical Services M Sdn Bhd v Swissray Asia Healthcare Co Ltd

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-24NCC-205–03 OF 2022
LIZA CHAN JC
4 SEPTEMBER 2022

Civil Procedure — Injunction — Fortuna injunction — Plaintiff filed originating summons against defendant for injunction to restrain filing of winding-up petition — Whether there was dispute between parties — Whether dispute to be determined by way of arbitration — Whether injunction ought to be allowed

The plaintiff, a Malaysian company, together with the defendant, a foreign company incorporated in Taiwan, executed a mutual non disclosure agreement culminating in a distributorship agreement ('DA') between the parties for a period of three years for medical machines under the brand name of 'Novadaq'. Pursuant to the defendant's quotation and the plaintiff's order, the plaintiff received the two medical machines which were delivered to the University Malaya Medical Centre. A dispute arose between the parties when the defendant demanded for an alleged debt ('the alleged debt'). In the event, due to non-payment, the defendant terminated the DA. Discussions were held thereafter. The defendant contended a settlement was arrived at, and when no payments were made, the defendant issued a second notice of demand to the plaintiff. When this notice of demand went unheeded, the statutory notice of demand was sent and hence the filing of this originating summons ('OS') by the plaintiff against the defendant for, inter alia, an injunction to restrain the defendant from filing, presenting and/or continuing with any petition for winding up premised on the statutory notice of demand issued by the defendant pursuant to s 466 of the Companies Act 2016 for the alleged debt. The plaintiff sought to argue that the statutory notice of demand issued by the defendant was based on a debt disputed on substantial grounds. The plaintiff additionally submitted that as there was a substantial bona fide dispute, the DA provided any dispute was to be determined by way of arbitration. The defendant argued that the plaintiff's application was misconceived and an abuse of court process and ought to be dismissed as, inter alia: (a) there was no bona fide dispute of the debt; (b) the plaintiff had repeatedly acknowledged or admitted the debt; and (c) the defendant was entitled to issue the statutory demand for non-payment.

Held, allowing the application:

(1) The court was inclined to follow the *Salford Estates (No 2) Ltd v Altomart Ltd (No 2)* [2015] Ch 589; [2014] EWCA Civ 1575 approach on the 'prima facie' dispute test. The fact that the debt was not admitted was sufficient to constitute a dispute, irrespective of the substantive merits of any defence. The court should not be required to investigate whether or not the debt was bona fide disputed on substantial grounds and instead, hold the parties to their bargain to resolve their dispute over the debt by their chosen method of dispute resolution to arbitrate the matter. The mere fact that there was a dispute as to the debt that fell within the scope of the arbitration agreement in the DA was sufficient cause for the Fortuna injunction to be granted for the purpose of compelling the parties to resolve their dispute via arbitration (see paras 33 & 35).

(2) There was nothing in the circumstances asserted upon by the defendant that took this case out of the ordinary and into the domain of 'wholly exceptional circumstances'. Therefore, there was no necessity to go on to consider whether the debt was, on the facts, disputed in good faith on substantial grounds. Thus, the fairer order to be made was to allow the injunction sought for the parties to abide by the outcome of the arbitration as the dispute appeared to fall within the scope of the broadly worded arbitration clause in the DA (see para 39).

(3) The plaintiff had not acted in abuse of process. There was no evidence that suggested the commencement of the OS was motivated by an improper or collateral purpose or actuated by bad faith. The proper procedure was for the parties to commence arbitration proceedings for the amount claimed such that the plaintiff's claims may also be considered. The mere fact that the plaintiff's arguments may turn out to be unmeritorious did not inevitably lead to the conclusion that it brought the OS abusively. Thus, the defendant was held to its original contractual bargain, namely, to resolve any dispute by arbitration (see paras 39 & 42).

[Bahasa Malaysia summary

Plaintif, sebuah syarikat Malaysia, bersama-sama dengan defendan, sebuah syarikat asing yang diperbadankan di Taiwan, melaksanakan perjanjian ketakdedahan bersama yang menyempurnakan perjanjian pengedaran ('PP') antara pihak-pihak untuk tempoh tiga tahun untuk mesin perubatan di bawah nama jenama daripada 'Novadaq'. Menurut sebut harga defendan dan pesanan plaintif, plaintif menerima dua mesin perubatan yang dihantar ke Pusat Perubatan Universiti Malaya. Pertikaian timbul antara pihak apabila defendan menuntut hutang yang didakwa ('hutang yang didakwa'). Dengan demikian, kerana tidak membayar, defendan telah menamatkan PP. Perbincangan diadakan selepas itu. Defendan berpendapat penyelesaian telah dicapai, dan apabila tiada pembayaran dibuat, defendan mengeluarkan notis tuntutan kedua kepada plaintif. Apabila notis tuntutan ini tidak diendahkan, notis tuntutan berkanun telah dihantar dan oleh itu pemfailan saman pemula ('SP')

ini oleh plaintif terhadap defendan untuk, antara lain, injunksi untuk menghalang defendan daripada memfailkan, mengemukakan dan/atau meneruskan dengan mana-mana petisyen untuk penggulungan berdasarkan notis tuntutan berkanun yang dikeluarkan oleh defendan menurut s 466 Akta Syarikat 2016 untuk hutang yang didakwa. Plaintif berhujah bahawa notis tuntutan berkanun yang dikeluarkan oleh defendan adalah berdasarkan hutang yang dipertikaikan atas alasan yang kukuh. Plaintif juga berhujah bahawa kerana terdapat pertikaian bona fide yang besar, PP menyatakan sebarang pertikaian harus ditentukan melalui timbang tara. Defendan berhujah bahawa permohonan plaintif telah disalah anggap dan penyalahgunaan proses mahkamah dan sepatutnya ditolak kerana, antara lain: (a) tiada pertikaian bona fide hutang; (b) plaintif telah berulang kali mengetahui atau mengakui hutang itu; dan (c) defendan berhak mengeluarkan tuntutan berkanun kerana tidak membayar.

Diputuskan, membenarkan permohonan:

(1) Mahkamah cenderung untuk mengikuti pendekatan *Salford Estates (No 2) Ltd v Altomart Ltd (No 2)* [2015] Ch 589; [2014] EWCA Civ 1575 pada ujian pertikaian 'prima facie'. Hakikat bahawa hutang itu tidak diakui adalah mencukupi untuk membentuk pertikaian, tanpa mengira merit substantif mana-mana pembelaan. Mahkamah seharusnya tidak perlu menyiasat sama ada hutang itu dipertikaikan secara bona fide atas alasan yang kukuh dan sebaliknya, memutuskan tawaran pihak-pihak untuk menyelesaikan pertikaian mereka mengenai hutang itu dengan kaedah penyelesaian pertikaian pilihan mereka untuk menimbang tara perkara itu. Fakta bahawa terdapat pertikaian mengenai hutang yang termasuk dalam skop perjanjian timbang tara di PP adalah kausa yang mencukupi untuk injunksi Fortuna diberikan bagi tujuan mendesak pihak-pihak menyelesaikan pertikaian mereka melalui timbang tara (lihat perenggan 33 & 35).

(2) Tiada apa-apa dalam keadaan yang ditegaskan oleh defendan yang membawa kes ini di luar kebiasaan dan ke dalam domain 'keadaan luar biasa sepenuhnya'. Oleh itu, tidak ada keperluan untuk terus mempertimbangkan sama ada hutang itu, pada fakta, dipertikaikan dengan suci hati atas alasan yang kukuh. Oleh itu, perintah yang lebih adil untuk dibuat adalah untuk membenarkan injunksi yang dipohon untuk pihak-pihak mematuhi keputusan timbang tara kerana pertikaian itu nampaknya termasuk dalam skop klausa timbang tara yang digunakan secara meluas dalam PP (lihat perenggan 39).

(3) Plaintif tidak bertindak menyalahgunakan proses. Tiada bukti yang mencadangkan permulaan OS didorong oleh tujuan yang tidak wajar atau kolateral atau didorong oleh niat jahat. Prosedur yang sepatutnya adalah bagi pihak-pihak untuk memulakan prosiding timbang tara bagi

jumlah yang dituntut supaya tuntutan plaintif juga boleh dipertimbangkan. Fakta bahawa hujahan plaintif mungkin menjadi tidak bermerit tidak semestinya membawa kepada kesimpulan bahawa ia membawa SP secara salah. Oleh itu, defendan telah dipegang pada perjanjian kontrak asalnya, iaitu, untuk menyelesaikan sebarang pertikaian melalui timbang tara (lihat perenggan 39 & 42).]

Cases referred to

AnAn Group (Singapore) Pte Ltd v VTB Bank [2020] SGCA 33, CA (refd)
Awangsa Bina Sdn Bhd v Mayland Avenue Sdn Bhd [2019] MLJU 1365; [2019] 1 LNS 590, HC (refd)
BDG v BDH [2016] 5 SLR 977, HC (consd)
Eco Measure Market Exchange Ltd v Quantum Climate Services Ltd [2015] EWHC 1797, Ch D (refd)
Ellerine Bros (Pty) Ltd and another v Klinger [1982] 2 All ER 737, CA (refd)
Fieldfisher LLP v Pennyfeathers Ltd [2016] BCC 697; [2016] EWHC 566, Ch D (consd)
Fortuna Holdings Pty Ltd v Deputy Federal Commissioner of Taxation [1978] VR 83; (1976) 2 ACLR 349, SC (refd)
Hayter v Nelson and Home Insurance Co [1990] 2 Lloyd's Rep 265, QBD (refd)
Lafarge Concrete (M) Sdn Bhd v Gold Trend Builders Sdn Bhd [2012] 6 MLJ 817, CA (refd)
Lasmos Ltd v Southwest Pacific Bauxite (HK) Ltd [2018] HKCFI 426; [2018] 2 HKLRD 449 (refd)
Megasteel Sdn Bhd (No Syarikat 181104-T) v Perwaja Steel Sdn Bhd (No Syarikat 187922-H) [2008] MLJU 252; [2008] 4 CLJ 352, CA (refd)
Metalform Asia Pte Ltd v Holland Leedon Pte Ltd [2007] SGCA 6, CA (refd)
Mobikom Sdn Bhd v Inmiss Communications Sdn Bhd [2007] 3 MLJ 316, CA (refd)
PRPC Utilities and Facilities Sdn Bhd v PBJV Group Sdn Bhd & Anor [2021] MLJU 2514; [2022] 2 CLJ 276, HC (refd)
Pacific & Orient Insurance Co Bhd v Muniammah Muniandy [2010] MLJU 2217; [2011] 1 CLJ 947, CA (refd)
Salford Estates (No 2) Ltd v Altomart Ltd (No 2) [2015] Ch 589; [2014] EWCA Civ 1575, CA (folld)
Tan Kok Tong v Hoe Hong Trading Co Sdn Bhd [2007] 4 MLJ 355, CA (refd)

Legislation referred to

Arbitration Act 1996 [UK] s 9
Arbitration Ordinance [HK]
Companies Act 1965 (repealed by Companies Act 2016) s 218
Companies Act 2016 ss 465, 466
Medical Device Act 2012

Eugene Jayaraj (with David Soosay) for the plaintiff.

Aawaisha Pillai (with Chuah Jo-Shua) for the defendant.

Liza Chan JC:

INTRODUCTION

[1] This originating summons ('OS') was filed on 31 March 2022 by the plaintiff against the defendant for:

(a) an injunction to restrain the defendant from:

(i) filing, presenting and/or continuing with any petition for winding up premised on the statutory notice of demand issued by the defendant pursuant to a s 466 of the Companies Act 2016 ('the CA 2016') dated 1 March 2022 for an alleged debt of USD158,413.75 ('alleged debt'); and

(ii) in the event a winding up petition is filed, from advertising and/or *gazetting* any petition for winding up until the defendant obtains a final order or judgment or award in respect of the alleged debt or any part thereof at the appropriate and competent forum or tribunal;

(b) a declaration that the alleged debt is not due and owing; and

(c) costs and other relief as the court deems fit.

[2] On 6 July 2022, I had allowed the Fortuna injunction with costs to the plaintiff and given broad reasons for my decision. This judgment contains the full reasons for my decision.

BACKGROUND

[3] The background facts are culled from the parties' affidavits.

[4] The plaintiff is a Malaysian company whilst the defendant is a foreign company incorporated in Taiwan.

[5] The plaintiff and the defendant met during an international medical convention 'World Congress of Surgery 2015' in Thailand. Subsequently a mutual non disclosure agreement dated 1 October 2015 was executed by the parties, culminating in a distributorship agreement ('DA') between the parties to be effective from 1 April 2016, for a period of three years for medical machines under the brand name of 'Novadaq'.

[6] The DA contained, inter alia, an arbitration clause as follows:

26.8 Arbitration. All disputes arising in connection with this Agreement shall be finally settled by arbitration. The arbitration shall be held in Zurich, Switzerland and shall be conducted in accordance with the Swiss rules of International Arbitration (*www.swissarbitration.ch*) The award rendered by the arbitrators shall be binding upon the Parties and may be entered in any court having jurisdiction thereof. This provision shall expressly survive termination of this Agreement.

[7] Pursuant to the defendant's quotation and the plaintiff's order, on 24 May 2016, the plaintiff received the two medical machines which were delivered to the University Malaya Medical Centre ('UMMC').

[8] A dispute arose between the parties when the defendant demanded for the alleged debt. In the event, due to non-payment, the defendant terminated the DA through its letter dated 30 August 2017.

[9] Discussions were held thereafter. The defendant contended a settlement was arrived at, and when no payments were made except for a sum of USD20,000 paid in December 2017, through their solicitors in Taiwan issued a second notice of demand dated 12 February 2020 to the plaintiff. When this notice of demand went unheeded, the statutory notice of demand was sent and hence the filing of this OS.

THE PLAINTIFF'S CASE

[10] Learned counsel for the plaintiff sought to argue that the statutory notice of demand issued by the defendant is based on a debt disputed on substantial grounds:

(a) the two medical machines were not 'purchased' by the plaintiff; the purchase order was allegedly issued merely to assist the defendant to deliver the machines to the end-user;

(b) the said machines were meant for demonstration and promotional purposes (ie, demonstration units);

(c) the agreement based on the representations emanating from the defendant's representatives and the understanding was that only in the event UMMC places a confirmed order, as well as upon registration of the medical machines under the Medical Device Act 2012; these agreements and understanding are subsequent conduct after the execution of the DA which varied the DA and as such, the parole evidence rule do not apply, neither does the entire agreement clause in cl 26.9 of the DA:

(i) the payment terms differ. Clause 4.3 DA read with Item 4 of Annex D of the DA states that for 'each purchase order', the plaintiff is to pay '100% of the purchase price' 'within 30 days of acceptance of

A the purchase order' either by wire transfer or by irrevocable letter of credit 'prior to the shipment'. However, the terms of the purchase order are 'Payment #1 = 10% deposit ...';

(ii) the defendant paid for the shipping costs, freight charges and insurance in respect of the delivery of the two medical machines although Item 8.2. Annex D of the DA states that these costs are at the plaintiff's 'own costs and risk';

(iii) the defendant only issued a performa invoice dated 13 May 2016 expressly stating it was meant for the use of 'customs purpose only'. The purported actual invoice back-dated to 26 May 2016, was only issued on 30 July 2017 ie, one year and five months after the delivery and issuance of the performa invoice; and

(iv) after the execution of the DA and the issuance of the performa invoice, the defendant sought payment of the 10% deposit and had not insisted on the 100% payment term.

(d) due to the defendant's act of terminating the plaintiff in August 2017, the plaintiff has suffered financial loss.

[11] The plaintiff additionally submitted that as there is a substantial bona fide dispute, the DA provided any dispute is to be determined by way of arbitration. In this context, learned counsel for the plaintiff pointed out that the proper test to be applied for in the grant of a 'Fortuna injunction' where there is an arbitration agreement or clause (or otherwise an agreement for parties to refer their dispute to arbitration) is for the applicant to establish a prima facie dispute that the debt fell within the arbitration agreement/clause ('the lower threshold prima facie test') — see *PRPC Utilities and Facilities Sdn Bhd v PBJV Group Sdn Bhd & Anor* [2021] MLJU 2514; [2022] 2 CLJ 276; *Salford Estates (No 2) Ltd v Altomart Ltd* [2014] EWCA Civ 1575 (UK), *BDG v BDH* [2016] 5 SLR 977, *Lasmos Ltd v Southwest Pacific Bauxite (HK) Ltd* [2018] HKCFI 426; [2018] 2 HKLRD 449 (Hong Kong) (which considered *Salford Estates* and *BDG v BDH*) and *Awangsa Bina Sdn Bhd v Mayland Avenue Sdn Bhd* [2019] MLJU 1365; [2019] 1 LNS 590. The plaintiff contends it has established a prima facie case that the dispute regarding the DA fell within the arbitration clause.

THE DEFENDANT'S CASE AGAINST GRANT OF FORTUNA INJUNCTION

[12] The defendant in summary argued that the plaintiff's application is misconceived and an abuse of court process and ought to be dismissed as:

(a) the transaction between the plaintiff and the defendant is a simple sale and purchase of the minimum number of required purchase of

machines in accordance with the terms of the DA; the plaintiff is bound by its plain terms. What and how the plaintiff intends to use the machines for is entirely up to them so long as it is in accordance to cl 4.1 of the DA wherein, they are entitled to purchase for demonstration, use and sale;

(b) even if there are any arrangements and/or negotiations (which are baseless, frivolous and misleading) leading up to the execution of the DA, they have all been put paid by cl 26.9 of the DA which stipulates that the DA supersedes all contemporaneous and prior agreements and understandings related to the subject matter hereof;

(c) there is no bona fide dispute of the debt; the plaintiff has repeatedly acknowledged or admitted the debt; irreparable damage is irrelevant;

(d) the plaintiff did not come to court with clean hands; it has refused to pay the balance price, by alleging that the purchase order is issued to assist the defendant to deliver the machines to the end customer (which is denied) in effect means the purchase order is a sham document created by the plaintiff to mislead the various authorities; and

(e) the defendant is entitled to issue the statutory demand for non-payment.

FORTUNA INJUNCTION PRINCIPLES

[13] The tests for the grant of a Fortuna injunction are well established. The two principles as set out in *Fortuna Holdings Pty Ltd v Deputy Federal Commissioner of Taxation* [1978] VR 83; (1976) 2 ACLR 349 are:

(a) first, where the presentation of a winding up petition which has no chance of success as a matter of law and fact, might produce irreparable damage to the company ('the first Fortuna principle'); and

(b) second, where the party seeking to present the winding up petition chooses to assert a disputed claim, by a procedure which might produce irreparable damage to the company, rather than by a suitable alternative procedure ('the second Fortuna principle').

[14] These principles are reiterated instructively in two Court of Appeal cases in *Mobikom Sdn Bhd v Inmiss Communications Sdn Bhd* [2007] 3 MLJ 316 and three years later in *Pacific & Orient Insurance Co Bhd v Muniammah Muniandy* [2010] MLJU 2217; [2011] 1 CLJ 947. In the later case, Ramly Ali JCA (later FCJ) provided the following useful explanation which merits production in extenso:

> [25] An application for an injunction to restrain an intended winding up petition against a company is known as a 'Fortuna injunction', taking its name from the case

of *Fortuna Holdings Pty Ltd v The Deputy Commissioner of Taxation* [1978] VR 83. In that case the court laid down the basis on which a court acts to restrain the presentation of a winding up petition and the two principles that guide courts in the grant of an injunction to that effect (see also: *Mobikom Sdn Bhd v Inmiss Communications Sdn Bhd* [2007] 3 MLJ 316; [2007] 3 CLJ 295 (CA).

[26] The first principle laid down in that case is that an injunction of that nature may be granted by court *where the presentation of the petition might produce irreparable damage to the company and where the proposed petition has no chance of success*. In order to succeed in getting injunction under this principle, the applicant must satisfy both limbs of the principle ie:

(i) *the intended petition has no chance of success, as a matter of law as well as a matter of fact* and

(ii) the presentation of such petition (which has no chance of success) might produce irreparable damage to the company.

(see: *Re A Company* [1894] 1 Ch 349; *Charles Forte Investment Ltd v. Amanda* [1964] 1 Ch 240; [1963] 2 All ER 940 and *Bryanston Finance Ltd v. De Vries (No 2)* [1976] 2 WLR 41; [1976] 1 All ER 25)

[27] This principle is not applicable to the present case. The respondent herein had obtained a valid and enforceable judgment against the insured as well as the insurer (appellant). The intended petition if filed is not bound to fail. He has a good chance to succeed. Therefore, whether or not it causes irreparable damage is of no consequence. Thus, the injunction applied for by the appellant in the present case, cannot be granted by court under this principle.

[28] *The second principle* established in the *Fortuna* case is that an injunction of that nature may be granted in cases *where a petitioner proposing to present a petition has chosen to assert a disputed claim, by a procedure which might produce irreparable damage to the company, rather than by a suitable alternative procedure*.

[29] *This principle applies only to disputed debt. It does not apply to cases where the debt in question is undisputed. As long as the debt cannot be disputed, it is not consequence whether or not it will cause irreparable damage to the company, if presented*. A valid and enforceable judgment of court as in the present case, (unless set aside or stayed) cannot be considered a disputed debt. The law is settled on this point. Therefore, an order for injunction as prayed for by the appellant in the present case, also cannot be granted under this principle. (Emphasis added.)

[15] In *Tan Kok Tong v Hoe Hong Trading Co Sdn Bhd* [2007] 4 MLJ 355 at para [8], the Court of Appeal held that when deciding whether to grant an injunction to restrain a petition that is based on a statutory demand for a debt, the court must be satisfied that the debt is bona fide disputed on substantial grounds. In *Tan Kok Tong*, the debt was disputed on substantial grounds — not as to its amount, but as to the terms of its repayment.

DEVELOPMENTS IN THE LAW — DISPUTED DEBT GOVERNED BY AN ARBITRATION AGREEMENT

English position

[16] The English Court of Appeal in 2014 in its decision in *Salford Estates (No 2) Ltd v Altomart Ltd (No 2)* [2015] Ch 589; [2014] EWCA Civ 1575, held that the test to be applied in respect of a disputed debt governed by an arbitration agreement ought to be lowered, and that, the English courts when faced with a disputed debt that was subject to an arbitration agreement, ought to dismiss or stay the winding up application, save in 'wholly exceptional circumstances' which the judge found 'difficult to envisage'. Sir Terence Etherton C, (with whom Longmore and Kitchin LJJ agreed) delivering the judgment of the court held this would be in accordance with the principle which mandated upholding the parties' agreement to arbitrate and the legislative policy that is in favour of arbitration although the court found that the mandatory stay provisions in s 9 of the 1996 Act (UK Arbitration Act) did not apply:

> [39] My conclusion that the mandatory stay provisions in s 9 of the 1996 Act do not apply in the present case is not, however, the end of the matter. Section 122(1) of the 1986 Act confers on the court a discretionary power to wind up a company. *It is entirely appropriate that the court should, save in wholly exceptional circumstances which I presently find difficult to envisage, exercise its discretion consistently with the legislative policy embodied in the 1996 Act*. This was the alternative analysis of Warren J in the Rusant case, at para 19.
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> [40] Henry and Swinton Thomas LJJ considered in *Halki Shipping Corpn v Sopex Oils Ltd* [1998] 1 WLR 726 that the intention of the legislature in enacting the 1996 Act was to exclude the court's jurisdiction to give summary judgment, which had not previously been excluded under the Arbitration Act 1975. *It would be anomalous, in the circumstances, for the Companies' court to conduct a summary judgment type analysis of liability for an unadmitted debt, on which a winding up petition is grounded, when the creditor has agreed to refer any dispute relating to the debt to arbitration. Exercise of the discretion otherwise than consistently with the policy underlying the 1996 Act would inevitably encourage parties to an arbitration agreement — as a standard tactic — to bypass the arbitration agreement and the 1996 Act by presenting a winding up petition. The way would be left open to one party, through the draconian threat of liquidation, to apply pressure on the alleged debtor to pay up immediately or face the burden, often at short notice on an application to restrain presentation or advertisement of a winding up petition, of satisfying the Companies court that the debt is bona fide disputed on substantial grounds. That would be entirely contrary to the parties' agreement as to the proper forum for the resolution of such an issue and to the legislative policy of the 1996 Act.*
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> [41] *There is no doubt that the debt mentioned in the petition falls within the very wide terms of the arbitration clause in the Lease. The debt is not admitted.* In accordance with the decision in the *Halki Shipping* case, that is sufficient to constitute a dispute

within the 1996 Act, irrespective of the substantive merits of any defence, and, were there proceedings on foot to recover the debt, to trigger the automatic stay provision in s 9(1) of the 1996 Act. For the reasons I have given, I consider that, as a matter of the exercise of the court's discretion under s 122(1)(f) of the 1986 Act, *it was right for the court either to dismiss or to stay the petition so as to compel the parties to resolve their dispute over the debt by their chosen method of dispute resolution rather than require the court to investigate whether or not the debt is bona fide disputed on substantial grounds.*

[42] The judge stayed the petition because, contrary to my conclusion, he thought that the mandatory stay provisions in s 9 were engaged. I consider that it would have been better to have dismissed the petition rather than to stay it in the absence of any evidence that there was another creditor of Altomart who was willing to be substituted as the petitioner. That is not, however, a point taken by *Salford Estates* on this appeal. (Emphasis added.)

[17] The key issue in *Salford Estates* was whether the petition to wind up a company on the ground of its inability to pay its debts should be stayed, where the underlying debt arose out of a contract containing an arbitration agreement.

[18] The *Salford Estates* approach was referred to and applied by English courts in several English authorities eg, in *Eco Measure Market Exchange Ltd v Quantum Climate Services Ltd* [2015] EWHC 1797 where the court stated at para [10] that 'the result of Salford, it seems to me, is to place a very heavy obstacle in the way of a party who presents a petition claiming sums due under an agreement that contains an arbitration clause'. The problem for such a petitioner is that the company is entitled to have the petition dismissed without having to show, as would normally be the case, that the debt upon which the petition is based is, to use the time-hallowed expression, bona fide disputed on substantial grounds. What the Court of Appeal decided in clear terms in the *Salford Estate* case was that, where there is an arbitration clause, it is sufficient to show that the debt is 'disputed' and for that it is sufficient to show that the debt is not admitted. In this case it is clear that the debt is disputed and indeed the dispute goes beyond a mere non-admission'. In *Fieldfisher LLP v Pennyfeathers Ltd* [2016] BCC 697; [2016] EWHC 566 (Ch), Nugee J concluded that under the *Salford* approach, 'the fact that the alleged debtor has made admissions in the past that money is due cannot fall within the description of wholly exceptional circumstances'. The court appeared to take the view that the *Salford* approach practically leaves no allowance for the winding up court to examine the genuineness of the dispute raised by the debtor-company. Indeed, Nugee J observed:

If the Companies court, when faced with a winding up petition, *ought to refrain from investigating the genuineness of any dispute* out of respect for the policy of the Arbitration Act, then, as far as I can see, *it ought equally to refrain from doing that in the case of administration as in the case of winding up* ... (Emphasis added.)

Singapore position

[19] *Salford Estate* was cited with approval by Aedit Abdullah JC (as he then was) in *BDG*. The plaintiff in that case sought an injunction to restrain the defendant from presenting a winding up application, on the basis that there was a dispute between them that was governed by a tiered arbitration clause. The plaintiff argued that the position in *Salford Estate* should be adopted because it was consistent with Singapore's pro-arbitration policy; that a different standard of proof ought to apply where an application to restrain the presentation of a winding up application is made on the basis that there is a dispute between the parties which is subject to an arbitration clause. The traditional approach had been to establish the existence of a substantial and bona fide dispute over the debt. The Singapore High Court agreed with the plaintiff, and held:

> [22] I accept that the broad approach in *Salford Estates* should be followed. The objective of the triable issue or good arguable case standard is to ensure that winding up is not staved off on flimsy or tenuous grounds. Similarly, summary judgment should not be avoided if the defendant's case is without foundation or basis. The triable issue standard thus ensures that remedies are readily obtained when nothing much can be said against the claim or application. This helps to oil the machinery of commerce and trade, and presumably helps promote certainty and efficiency. That objective is however less pressing and dominant when one is confronted with an arbitration clause. The countervailing concern is to hold parties to their agreement; if they have made a bargain that disputes are to be arbitrated, then they should be held to it. It may be that their case is weak, and would be readily dismissed by the arbitrators; but such weakness of the case would be a matter for the arbitrators to decide. The court should not generally step in; indeed, it may be that the parties selected process, arbitration, may lead to a different result from the court's assessment. Given such different considerations, the adoption of a different standard from the usual one in the stay or enjoining of winding up proceedings would be justified on principle. In addition, in these situations, the parties are essentially in dispute about the existence of a dispute. Trying to ascertain a triable issue in this context is likely to be an exercise that is not fruitful, efficient or proportionate, without any countervailing benefit.
>
> [23] It may be thought that adopting this lower standard would stymie the winding up regime by opening the door to gaming of the system by companies desperate to fend off their creditors. There are two responses to this. Firstly, if indications are that issues are not raised bona fide, that would be a reason to find that there is no dispute prima facie, or that the court's powers should not be exercised in the applicant's favour. Secondly, any apparent injustice suffered by the creditors would have to be assessed in the context of the bargain struck between these creditors and the company. Arbitration would have been contemplated as being part of the process from the moment the parties signed off on the agreement. Nothing inequitable or unfair would result from the parties being made to go through arbitration before they invoke the winding up process. If an arbitration clause was included, there is no real injustice: *pacta sunt servanda*.

[20] In *BDG*, 'there is an allegation of a binding settlement on one side, and a denial on the other', Aedit Abdullah JC in applying the lower prima facie standard, held that a dispute existed whenever a claim by one side was asserted to be disputed or denied by the other. There was no need to go into the merits of the respective parties' claims, and he found that the plaintiff-company had successfully established a prima facie case that: (a) a dispute existed; (b) it had complied with the requirements of the tiered dispute resolution clause; and (c) such dispute fell within the scope of the arbitration clause and granted the injunction against the defendant-creditor.

[21] Four years later, the Court of Appeal of Singapore in *AnAn Group (Singapore) Pte Ltd v VTB Bank* [2020] SGCA 33 considered the standard of review in respect of a winding up petition based on a debt, which was the subject of an arbitration agreement. The Court of Appeal of Singapore:

(a) after a survey of the developments across various jurisdictions since *Salford Estates* was decided, followed the *Salford Estates* approach, concluding at [56] that winding up proceedings would be stayed or dismissed 'as long as: (a) there is a valid arbitration agreement between the parties; and (b) the dispute falls within the scope of the arbitration agreement, provided that the dispute is not being raised by the debtor in abuse of the court's process';

(b) opined at [94]–[100] that the 'wholly exceptional circumstances' exclusion was too exacting a standard, and instead, imposed the 'abuse of the court's process' exclusion instead;

(c) however emphasised that the abuse of process control mechanism cannot be used as a gateway for parties to introduce arguments on the merits of the underlying dispute, when such arguments are plainly irrelevant under the prima facie standard. Hence, the court will not be in the position to determine whether the defence is 'so obviously lacking in merit'. That the defence is 'so obviously lacking in merit' in the court's view, ought not to be a basis for the court to find abusive conduct on the part of the alleged debtor. If abuse of process can be established by demonstrating that the defence is plainly unmeritorious, parties would effectively be granted a backdoor to argue on the merits of the dispute, even though the prima facie standard precisely prevents such arguments from being raised or entertained;

(d) held in determining whether an applicant for a stay or dismissal of the winding up application is guilty of an abuse of process, the court must be wary that it does not engage in examining the merits of the parties' dispute, since the court is not the proper forum to adjudicate the dispute between the parties. The adoption of such an approach gives deference to the parties' agreement to arbitrate, while the court retains its inherent powers to check against abuses of the court's processes; and

(e) referred to the fact that Nugee J in *Fieldfisher LLP* had said that 'the fact that the alleged debtor has made admissions in the past that money is due cannot fall within the description of wholly exceptional circumstances that the Chancellor seems to have had in mind'.

Hong Kong position

[22] In the Hong Kong Court of First Instance in *Lasmos Limited v Southwest Pacific Bauxite (HK) Limited* [2018] HKCFI 426 ('Lasmos'), Harris J, in conducting a survey of the authorities in Hong Kong, England and Singapore which considered the question of what impact the presence of an arbitration clause in an agreement giving rise to a debt relied on to support a winding up petition has on the exercise of the court's discretion to make a winding up order, cited both *Salford Estates* and *BDG*. Harris J observed that like the UK in reference to the reasoning employed by Sir Etherton in *Salford Estates*, Hong Kong has enacted legislation advancing a policy encouraging and supporting party autonomy in determining the means by which a dispute arising between them should be resolved (ie, the Arbitration Ordinance (Cap 609) (HK)), and that the courts of Hong Kong have been strongly supportive of the development of arbitration and the policy underlying the Arbitration Ordinance (at [15]–[16]). He then noted that:

(a) to conduct a summary judgment type analysis of liability for an unadmitted debt on which a winding up petition is grounded, when the creditor has agreed to refer any dispute relating to the debt to arbitration, would give no weight to the policy underlying the Arbitration Ordinance (at [17]); and

(b) Abdullah JC considered that the standard of proof that the debtor-company was required to meet was one of a prima facie disputes, that the court would not be concerned with the strength of its defence, and that it was also necessary for it to demonstrate prima facie compliance with the dispute resolution clause.

[23] Harris J held at [31] that he intended to depart from the approach taken by earlier Hong Kong authorities, and thus held that a winding up petition should generally be dismissed where:

(a) the company disputes the debt relied on by the petitioner;

(b) the contract under which the debt is alleged to arise contains an arbitration clause that covers any dispute relating to the debt; and

(c) the company takes the steps required under the arbitration clause to commence the contractually mandated dispute resolution process and files an affidavit in opposition to the winding up petition.

[24] In *Lasmos*, the winding up petition was struck out since the company sought to be wound up disputed the debt and required the dispute to be resolved in accordance with the arbitration agreement.

Malaysian position

[25] There are two recent decisions of the Malaysian High Court which are relevant to the subject. The first of these is *Awangsa Bina Sdn Bhd v Mayland Avenue Sdn Bhd* [2019] MLJU 1365; [2019] 1 LNS 590 which after setting out the decisions in *Salford Estates*, *BDG* and *Lasmos*, in applying at [25] the lower threshold of merely showing a prima facie dispute and Aedit Abdullah's pronouncement in *BDG* that a 'dispute existed whenever a claim by one side was asserted to be disputed or denied by the other', the court struck out the winding up application as the debtor had shown that there was a disputed debt (by denying its indebtedness) which was the subject matter of an arbitration clause.

[26] The second case is *PRPC Utilities and Facilities Sdn Bhd v PBJV Group Sdn Bhd & Anor* [2021] MLJU 2514; [2022] 2 CLJ 276 decided by Wan Muhammad Amin JC. He considered the cases of *Salford Estates*, *BDG* and *Lasmos* as applied in *Awangsa* and held at [36] and [38] that the proper test which he termed 'the lower threshold prima facie test' to be applied for the grant of a Fortuna injunction where there is an arbitration agreement or clause (or otherwise an agreement for parties to refer their dispute to arbitration) is for the applicant to establish a prima facie dispute that the debt fell within the arbitration agreement/clause. Simply put, if a petitioner cannot succeed on his winding up petition based on the lower threshold prima facie test, how can he then expect to succeed in an application for a Fortuna injunction.

DECISION OF THIS COURT

[27] As I see it, noting that the plaintiff's claim arose from breach of the DA which contained an arbitration agreement, the first issue to be determined is whether there is a dispute between the parties and if so, in considering whether to grant the Fortuna an injunction, whether the plaintiff needs to establish the existence of bona fide dispute on substantial grounds over the debt *or* the *Salford Estates* approach is to be taken — ie the plaintiff need only show that there is a prima facie dispute over the debt which is governed by an arbitration agreement.

[28] The claim made by the defendant arises from or in relation to the DA. A 'claim' is defined by the *Black's Law Dictionary* as:

> To demand as one's own or as one's right; to assert; to urge; to insist. A cause of action. Means by or through which claimant obtains possession or enjoyment of privilege or thing. Demand for money or property as of right ...

[29] The statutory demand as such, is a claim arising out of or related to the DA. the plaintiff disputes payment. The parties have chosen and agreed that an arbitration be the forum for the dispute to be ventilated. The arbitration agreement housed in cl 26.8 of the DA states 'All disputes arising in connection with this Agreement shall be finally settled by arbitration ...'.

[30] The word 'dispute' has a very wide meaning. See:

(a) in *Hayter v Nelson and Home Insurance Co* [1990] 2 Lloyd's Rep 265, Saville J summarised his conclusions pithily at p 268 as follows:

> In my judgment in this context neither the word 'disputes' nor the word 'differences' are confined to cases where it cannot then and there be determined whether one party or the other is in the right. Two men have an argument over who won the University Beat Race in a particular year. In ordinary language they have a dispute over whether it was Oxford or Cambridge. The fact that it can be easily immediately demonstrated beyond any doubt that the one is right and the other is wrong does not and cannot mean that that dispute did not in fact exist. Because one man can be said to be indisputably right and the other indisputably wrong does not, in my view, entail that there was therefore never any dispute between them ...

(b) Lord Justice Templeman in *Ellerine Bros (Pty) Ltd and another v Klinger* [1982] 2 All ER 737 in delivering the lead judgment of the court held at p 741:

> ... it is not necessary, for a dispute to arise, that the defendant should write back and say, 'I don't agree.' If on analysis, what the plaintiff is asking or demanding involves a matter on which agreement has not been reached and which falls fairly and squarely within the terms of the arbitration agreement, then the applicant is entitled to insist on arbitration instead of litigation.
>
> Later, at p 743, His Lordship said 'there is a dispute until the defendant admits that a sum is due and payable'.

[31] I am of the respectful view there is a dispute here between the parties. I am also fortified in my view by considering Aedit Abdullah JC's pronouncement in *BDG* that 'A dispute existed whenever a claim by one side was asserted to be disputed or denied by the other'. This pronouncement was followed by Wong Chee Lin J in *Awangsa*.

[32] Next, I should consider whether to grant the Fortuna injunction, based on the test in *Tan Kok Tong* and *Metalform Asia Pte Ltd v Holland Leedon Pte*

Ltd [2007] SGCA 6 (CA) in that the court must be satisfied that the debt is bona fide disputed on substantial grounds *or* to follow the *Salford Estates* approach where the plaintiff need only show that there is a prima facie dispute over the debt which is governed by an arbitration agreement. This 'bona fide disputed on substantial grounds' is analogous to the 'triable issue test' discussed in Singapore.

[33] Having carefully considered the reasoning in the various cases as discussed above, I am inclined to follow the *Salford Estates* approach on the 'prima facie' dispute test. The fact that the debt is not admitted is sufficient to constitute a dispute, irrespective of the substantive merits of any defence. Based on this test as applied by the UK, Singapore, Hong Kong and Malaysian courts (which Wan Muhammad Amin JC termed 'the lower threshold test'), this court should not be required to investigate whether or not the debt is bona fide disputed on substantial grounds and instead, hold the parties to their bargain to resolve their dispute over the debt by their chosen method of dispute resolution to arbitrate the matter.

[34] In *AnAn Group*, the Singapore Court of Appeal has this to say:

> [72] Given that the prima facie standard applies for ordinary claims which are subject to arbitration, a fortiori, it should apply to a winding up application, which carries far more severe consequences for a company.

[35] Thus, the mere fact that there is a dispute as to the debt that fell within the scope of the arbitration agreement in the DA is sufficient cause for the Fortuna injunction to be granted for the purpose of compelling the parties to resolve their dispute via arbitration. This lower standard is consonant with the Malaysian court's policy underpinning minimum curial intervention when parties have chosen arbitration over litigation. The Singapore Court of Appeal in *AnAn Group* explained this very succinctly as follows:

> Coherence in the law
>
> [60] Adopting the lower standard of review would, in our view, promote coherence in the law concerning stay applications, so that parties to an arbitration agreement are not encouraged to present a winding up application as a tactic to pressure an alleged debtor to make payment on a debt that is disputed or which may be extinguished by a legitimate crossclaim.
>
> ...
>
> [74] Coherence is therefore not sought for coherence's sake. By adopting the prima facie standard, the law will speak with one voice, and parties will thereby be discouraged from abusing the court's winding up jurisdiction as a means to avoid the parties' agreed method of dispute resolution. This is the fundamental reason why the courts forbear from examining the merits of a claimant's case in *forum non conveniens*, IAA and EJC applications: see *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd* [2018] 2 SLR 1271 ('Vinmar') at [119].

Party autonomy

[75] The triable issue standard when applied in the context of disputes subject to arbitration also offends against the principle of party autonomy, which is the 'cornerstone underlying judicial non-intervention in arbitration': *Tjong Very Sumito and others v Antig Investments Pte Ltd* [2009] 4 SLR(R) 732 ('Tjong Very Sumito') at [28].

[76] This is so because the triable issue standard is an exacting one, and it requires a thorough examination of the evidence. As this court observed in *Goh Chok Tong v Chee Soon Juan* [2003] 3 SLR(R) 32 at [25]:

> It is a settled principle of law that in an application for summary judgment, the defendant will not be given leave to defend based on mere assertions alone: *Banque de Paris et des Pays-Bas (Suisse) SA v Costa de Naray and Christopher John Walters* [1984] 1 Lloyd's Rep 21 at [23]. The court must be convinced that there is a reasonable probability that the defendant has a real or bona fide defence in relation to the issues. In this regard, the standard to be applied was well-articulated by Laddie J in *Microsoft Corporation v Electro-Wide Limited* [1997] FSR 580, where he said at pp 593 to 594 that:
>
> > [I]t is not sufficient just to look at each factual issue one by one and to consider whether it is possible that the defendant's story in relation to that issue is credible. *The court must look at the complete account of events put forward by both the plaintiff and the defendants and … look at the whole situation*. The *mere fact that the defendants support their defence by sworn evidence does not mean that the court is obliged to suspend its critical faculties and accept that evidence as if it was probably accurate*. If, having regard to inconsistency with contemporaneous documents, inherent implausibility and other compelling evidence, the defence is not credible, the court must say so. It should not let the filing of evidence which surpasses belief deprive a plaintiff of its entitlement to relief. (Emphasis added.)

[78] More crucially, by displacing the decision-making capacity of the arbitral tribunal in respect of the dispute, the court is in effect presuming that it has arrived at the same result as the tribunal would have, when this may not necessarily be the case. As Abdullah JC noted in *BDG* ([16]) at [22], 'the parties ['] selected process, arbitration, may lead to a different result from the court's assessment'. Hence, substantive prejudice may be caused to the parties if their choice of dispute resolution is not strictly adhered to. Such prejudice is exacerbated by the severe reputational and commercial damage that follow a winding up application.

[79] Problems of undercutting the parties' pre-dispute bargain will be amplified if the court directs, on the basis that no triable issues are demonstrated by the alleged debtor, that the debtor be wound up. The judge in *Dayang* ([39]) considered that this would not affect the parties' agreement to arbitrate, as the court would not, in so deciding, have determined the matter, since the liquidator would be the final arbiter of the dispute vis a vis the disputed debt (*Dayang* at [71]–[72] and [76]). But, the practical implication of this is that the court would then offload the decision-making function, which properly belongs to the arbitral tribunal, onto the liquidator, for determination via the proof of debt process. That the dispute is to be decided by the liquidator and not the court misses the point altogether. In either

A event, the dispute will not be decided by the parties' agreed method of dispute resolution, ie, arbitration. This plainly raises the same problem of undermining the parties' agreement.

B **[36]** The setting aside of the winding up order in *AnAn Group* was because of the arbitration clause in the global master repurchase agreement, coupled with the Singapore Court of Appeal's recognition of the prima facie threshold and its operation vis a vis the arbitration clause. The decision did not mean that no debt was owed by *AnAn*. The decision simply meant that the disputed debt ought to be contested in the contractual forum, ie, arbitration.

C

[37] The *AnAn Group* decision significantly altered the law in this area in so far as cross claims or disputed debts which are the subject of arbitration agreements are concerned.

D

[38] It is noteworthy that there is no decision by our appellate courts on this area. I am inclined to follow the *Salford Estates* approach.

E **[39]** In the final analysis, having considered the arguments and contentions made by the parties, I hold the view that:

(a) the facts suggest that the prima facie threshold has been crossed. I bear in mind too that, Nugee J concluded in *Fieldfisher LLP* that under the *Salford* approach, 'the fact that the alleged debtor has made admissions

F in the past that money is due cannot fall within the description of wholly exceptional circumstances'. This will put paid the defendant's assertion that there were past admissions/acknowledgments. In fact the 'wholly exceptional circumstances' test at [39] of *Salford Estates* is an exacting one, as stated by the Court of Appeal of Singapore in *AnAn Group* and

G Nugee J in *Fieldfisher LLP.* The circumstances in which the court will enquire into whether or not the debt is disputed in good faith or on substantial grounds will be very rare, for the reasons given in *Salford Estates.* There is, with respect, nothing in the circumstances here asserted upon by the defendant that takes this case out of the ordinary and into

H the domain of 'wholly exceptional circumstances'. Therefore, there is no necessity for me to go on to consider whether the debt is, on the facts, disputed in good faith on substantial grounds. The court is not concerned with the strength of the plaintiff's defence;

I (b) thus, the fairer order to be made was to allow the injunction sought for the parties to abide by the outcome of the arbitration as the present dispute appears to fall within the scope of the broadly-worded arbitration clause in the DA;

(c) the plaintiff had not acted in abuse of process. I do not find any evidence that suggests the commencement of this OS was motivated by an improper or collateral purpose or actuated by bad faith; and

(d) even on the higher triable issue threshold, the plaintiff should succeed as its case is not entirely hopeless. For example, in an email of 9 September 2016 pertaining to payment of the deposit, the plaintiff states there is still the sale to (UMMC) reckon with. The conduct of the parties post-delivery of the medical machines also raise the question whether there is a variation of the terms of the DA; and if so the plaintiff may have a genuine cross claim for damages for wrongful termination. As such, the proper procedure was for the parties to commence arbitration proceedings for the amount claimed such that the plaintiff's claims may also be considered. In any case, the mere fact that the plaintiff's arguments may turn out to be unmeritorious does not inevitably lead to the conclusion that it brought this OS abusively — see a discussion at [102] of *AnAn Group* on why AnAn's conduct of its case did not amount to an abuse of process.

[40] For the sake of completeness, although it will not change the decision that this court made, it bears mention that the plaintiff's assertion that there is no judgment or award obtained by the defendant prior issuing the statutory demand is misconceived. A reference to just two cases (although decided in respect of s 218 of the former Companies Act 1965, the provisions of which were the same as those in ss 465 and 466 of the CA 2016) make this clear:

(a) in *Megasteel Sdn Bhd (No Syarikat 181104-T) v Perwaja Steel Sdn Bhd (No Syarikat 187922-H)* [2008] MLJU 252; [2008] 4 CLJ 352, Gopal Sri Ram JCA (as he then was) held as follows:

> A creditor, generally speaking, does not have to obtain judgment before instituting winding up proceedings against a company. That is the purpose for which s 218(2)(a) of the Companies Act 1950 was enacted.

(b) in *Lafarge Concrete (M) Sdn Bhd v Gold Trend Builders Sdn Bhd* [2012] 6 MLJ 817, Jeffrey Tan JCA pronounced:

> [6] Before we proceed to answer those questions, we should perhaps say that 'a creditor is not required to obtain a judgment before serving a statutory demand ...' (*The Law of Company Liquidation* (4th Ed), by Andrew R Keay at p 83) and 'whether or not judgment had been obtained, an unpaid creditor is, as a general rule, entitled to a winding up order against a company which is insolvent' (*The Law of Company Liquidation* (4th Ed), by Andrew R Keay at p 91). Where there is no judgment, it is not uncommon for companies to argue that the debt is disputed. But 'in order to oppose a winding up petition, the respondent must raise a bona fide dispute in both a subjective and objective sense. It must be honestly believed to exist and must be based on substantial or reasonable grounds — *BMC Construction Sdn Bhd v Dataran*

Rentas Sdn Bhd [2001] 1 MLJ 356' (*Chan & Koh on Malaysian Company Law* (2nd Ed), at para 22.145).'

[41] I end by referring to Alan Steinfeld QC in *Eco Measure Market Exchange*. He explained the significant effect of *Salford Estates* in [10] of his judgment:

> *The result of Salford (above), it seems to me, is to place a very heavy obstacle in the way of a party who presents a petition claiming sums due under an agreement that contains an arbitration clause. The problem for such a petitioner is that the company is entitled to have the petition dismissed without having to show, as would normally be the case, that the debt upon which the petition is based is, to use the time-hallowed expression, bona fide disputed on substantial grounds. What the Court of Appeal decided in clear terms in the Salford Estate case was that, where there is an arbitration clause, it is sufficient to show that the debt is 'disputed' and for that it is sufficient to show that the debt is not admitted.* In this case it is clear that the debt is disputed and indeed the dispute goes beyond a mere non admission.

[42] For reasons given, this court would hold the defendant to its original contractual bargain, namely, to resolve any dispute by arbitration. I thus exercised my discretion to allow prayer 1 of the OS with costs subject to allocator; prayer 2 is not necessary, prayer 3 of the OS (set out at [1](b) above) cannot be countenanced as it will be an overreach into the remit of the arbitral tribunal's powers.

Application allowed.

Reported by Nabilah Syahida Abdullah Salleh